



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Sony Corporation of America

File: B-225512

Date: February 24, 1987

### DIGEST

Where an agency lacks sufficient data to write criteria to describe the attributes of a video cassette in an approved source procurement, it has broad latitude to approve a substitute cassette upon whatever data it deems adequate for that purpose if the agency concludes that the data submitted with the bid provides adequate assurance that the substitute item will perform properly. Such an approval will not be questioned unless the decision was made in a manner that is tantamount to fraud or willful misconduct.

### DECISION

Sony Corporation of America protests the award of an indefinite quantity contract for high-density video tape cassettes to Spartan Industries, Inc., under request for proposals (RFP) No. F04606-86-R-0233, issued by the Department of the Air Force, Sacramento Air Logistics Center, California. The RFP limited competition to products manufactured by four previously approved sources, including Sony, that were listed in the solicitation. However, clause M-46 of the RFP permitted offers from other firms to be considered provided they presented sufficient data to allow the government to evaluate the acceptability of the offered items or if such offers otherwise qualified under the clause. Sony essentially contends that Spartan, which was not listed in the solicitation as an approved source, failed to submit adequate data to permit the government to evaluate the Spartan proposal as acceptable.

We deny the protest.

Clause M-46 of the RFP, entitled "Restrictive Acquisition Method Code," permitted consideration of offers from unapproved sources if:

"(2) The offeror submits, prior to or with its proposal, evidence of having satisfactorily produced the item(s) for a Department of Defense agency or the prime equipment manufacturer(s); or

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"(3) The offeror submits prior to or with its proposal engineering data (such as manufacturing controlled drawings, qualification test reports, quality assurance procedures, etc.) sufficient to determine acceptability of the item(s)."

However, the RFP stated that the government would only consider offers from unapproved sources if the government could determine that the item was acceptable and if the government could evaluate the submittal and grant approval in time to meet the government's requirements. The RFP did not define any standards that a substitute product would have to meet to be acceptable for government use.

Eight proposals (three from approved sources and five from unapproved sources) were received by September 4, 1986, the closing date for receipt of initial proposals. Discussions were held with four offerors determined to be within the competitive range, including Spartan and one other unapproved source. Best and final offers were received by the due date of September 24, 1986. The low offeror, Spartan, proposed Maxell Professional High Grade video tape, P/N KCA-60HGPA, and had submitted technical literature during discussions in support of its proposal. Spartan offered a price of \$10.97 per tape while the second low offeror, Sony, offered a price of \$11.50 per tape.

The Air Force reports that its technical evaluators found the Maxell tape offered by Spartan to be acceptable based on the technical literature submitted by Spartan. In this regard, the technical literature contained in the Spartan proposal consisted of commercial specification brochures, which, among other things, set forth the specifications for the KCA-60, including recording time, physical properties, magnetic properties, video performance and audio performance. However, the Spartan technical literature did not contain test data supporting the claimed performance characteristics. The Air Force awarded the contract to Spartan on September 30, 1986. This protest followed the Air Force's denial of Sony's agency-level protest.

Sony argues that the technical data submitted by Spartan was inadequate for assessing whether the Maxell tape is "comparable and equal" to the products of the approved sources. Sony contends that the Spartan commercial specifications do not constitute "engineering data" within the meaning of clause M-46 of the RFP and are otherwise defective because they do not contain test criteria or test notes as to how the specification values in the brochures were arrived at and from which testing parameters can be determined for

meaningful comparison among the different products. Sony also argues that there are significant technical differences between the Maxell tape and the Sony tape and that therefore the Maxell tape is not an "equivalent product."

At the outset, we note that the contracting agency has the primary responsibility for determining its minimum needs and for determining whether an offered item will satisfy those needs since it must bear the burden of any difficulties incurred by reason of a defective evaluation. See, e.g., First Harlem Management Corp., B-188454, July 7, 1977, 77-2 CPD ¶ 12. Moreover, whether an offeror has presented sufficient information to convince the cognizant procuring activity that the proffered item meets the agency's minimum needs is essentially a technical judgment committed to the agency's discretion. Torrington Co., B-210877 et al., Sept. 2, 1983, 83-2 CPD ¶ 298. Here, the solicitation did not require that unapproved sources submit test data to support the claimed performance characteristics of the offered substitute item. As the Air Force correctly points out, the engineering data listed in clause M-46 ("such as manufactured controlled drawings, qualification test reports, quality assurance requirements, etc.") are not all inclusive but are merely examples of the types of engineering data that may be submitted.

Since the video tapes being acquired are not items to be used in a complex application, we have no basis to disagree with the Air Force that Spartan's commercial specification brochures, even without test data, adequately presented sufficient data for evaluation as to acceptability. In prior cases dealing with the procurement of spare parts, we have expressed the view that in circumstances where the government needs to assure that it receives satisfactory replacement parts but is not in a position, for lack of sufficient data, to write criteria to describe them, a qualifying procedure similar to the one used in this case is acceptable. In such circumstances, we held, the acceptability of the substitute item must be determined on a case-by-case basis by assessing whether, in view of the available data, there is adequate assurance that the equipment in which the part will be used will perform properly, taking the nature and function of the equipment into account. Edcliff Instruments, B-205371, Apr. 26, 1982, 82-1 CPD ¶ 380.

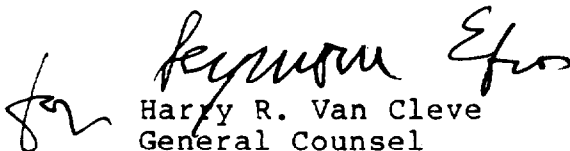
We think similar reasoning must apply here in the interest of enhancing competition, given the nature and the use of the item being procured. While we recognize that there are design variations in the video tape cassettes manufactured by different firms for similar applications, in the final

analysis, the acceptability of these tapes must be determined by the agency based on whatever data it deems adequate for that purpose. In view of the broad latitude reserved to the agency to define its needs in connection with such a determination, we have held that an agency's decision to accept an unapproved source's substitute item in an approved source procurement will not be questioned by our Office unless the decision was tantamount to fraud or willful misconduct. Edcliff Instruments, B-205371, supra. Here the Air Force found Spartan's Maxell tape to be acceptable based on technical literature submitted by Spartan, and there simply has been no showing that the Air Force's decision was based on fraud or willful misconduct.

Additionally, clause M-46, as quoted above, also permits the acceptance of a product from an unapproved source if the offeror presents evidence that it has previously satisfactorily produced the item for a Department of Defense agency. The Air Force reports that a contract was recently awarded to one of the approved sources listed in this solicitation for the same Maxell tape offered by Spartan. While the contracting officer was not aware of this fact when he awarded the contract to Spartan, we think it lends further support to the reasonableness of the Air Force's determination to accept the Spartan product.

Finally, Sony complains that Spartan only submitted its technical literature concerning the Maxell tape to the Air Force during discussions and that therefore Spartan's initial proposal was informationally deficient. In negotiated procurements, informational deficiencies in an initial proposal are a proper subject for resolution through discussions, which occurred here. See Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400.

The protest is denied.

  
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General Counsel